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June 10, 1999

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; FCC 99-86 (rel. May 7, 1999)

Dear Ms. Salas:

Enclosed for filing please find an original and nine copies of MCI WORLDCOM, Inc. and AT&T Corp.'s "Motion For A Stay Pending Judicial Review" with the attached "Declaration of Sherry Lichtenberg." I have also enclosed one additional copy to be file-stamped and returned in the enclosed envelope.

Please do not hesitate to contact me if you have any questions.

Sincerely,

William M. Hohengarten

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of	)	
the Local Competition Provisions of	)	CC Docket No. 96-98
the Telecommunications Act of 1996	)	
	)	
Deaveraged Rate Zones for	)	
Unbundled Network Elements	)	

MOTION FOR A STAY PENDING JUDICIAL REVIEW

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Dated: June 10, 1999

SUMMARY

MCI WORLDCOM, Inc. ("MCI WorldCom") and AT&T Corp. ("AT&T") respectfully seek a stay of the Commission's May 7, 1999 Order in this proceeding[1/] suspending the rule requiring state utility commissions to deaverage rates for unbundled network elements and to establish at least three geographically deaveraged rate zones pursuant to the Telecommunications Act of 1996 ("the Act" or "the 1996 Act"). On May 17, 1999, MCI WorldCom filed a petition in the United States Court of Appeals for the District of Columbia Circuit seeking to vacate the Order, MCI WorldCom, Inc. v. Federal Communications Commission, No. 99-1182 (D.C. Cir. filed May 17, 1999).

The Order is unlawful and arbitrary and capricious, and is likely to be vacated on judicial review. The Order flatly contradicts the 1996 Act because the Commission lacks statutory authority to suspend or forbear from enforcing regulations implementing the Act's unbundling requirements, including the requirement that rates for unbundled network elements be "based on the cost" of providing those elements, until such time as those requirements have been fully implemented. 47 U.S.C. § 160(d). Similarly, by delaying implementation of deaveraged rates until the realization of universal service reform, the Order flouts Congress's unequivocal direction that the Commission's pricing regulations be in place to guide state interconnection proceedings and that implementation of the pricing rules under §§ 251 and 252 of the Act precede implementation of the universal service reform provisions under § 254. The Order is also unlawful because the Commission did not

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[1/] Order, In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 99-86 (rel. May 7, 1999) ("Order").

follow the notice and comment procedures mandated by the Administrative Procedure Act. 5 U.S.C. § 553 ("APA").

Moreover, the Order is arbitrary and capricious because the Commission failed to provide a reasoned explanation for the sudden abandonment of its long-standing policies to (i) require deaveraged rates for network elements, (ii) ensure that the Commission's regulations implementing the local competition provisions of the Act remain in effect while interconnection arbitrations are pending, and (iii) ensure that rates are deaveraged prior to the implementation of universal service reform.

There is no question that the equities favor the entry of a stay pending judicial review. The Commission's Order resurrects a barrier to entry in many markets for local telecommunications services that the Commission, AT&T, MCI WorldCom and others successfully persuaded the Supreme Court to remove. The improperly inflated rates, the indefinite delay in establishing rules, and the continued uncertainty resulting from the Order will prevent or delay AT&T and MCI WorldCom from entering those markets both now and in the future. Blocking MCI WorldCom and AT&T from those markets will inflict incalculable harm to their businesses, and no damages remedy is available to make MCI WorldCom and AT&T whole from these losses.

Finally, a stay is very much in the public interest. Harm to competition is necessarily public harm, and the Order will inevitably delay realization of the pro-competitive benefits of the Act. Moreover, immediate implementation of local competition reforms will have no effect on implicit universal service subsidies in the foreseeable future. No party, therefore, will be harmed by staying the Order.

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	)	
Deaveraged Rate Zones for	)	
Unbundled Network Elements	)	

MOTION FOR A STAY PENDING JUDICIAL REVIEW

MCI WorldCom, Inc. ("MCI WorldCom") and AT&T Corp. ("AT&T"), through the undersigned counsel (collectively "movants"), move the Federal Communications Commission (the "Commission") to stay pending judicial review the Order released on May 7, 1999, in In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 99-86 (rel. May 7, 1999) ("Order"). The Order, which became effective upon its issuance on May 7, 1999,[2/] arbitrarily, capriciously, and unlawfully suspends the effectiveness of the Commission's Rule 507(f) requirement that state commissions deaverage rate zones for unbundled network elements, 47 C.F.R. § 51.507(f), until six months after the Commission orders the implementation of high-cost universal service support for non-rural local exchange carriers ("LECs") pursuant to § 254 of the Telecommunications Act of 1996 ("Act" or "1996 Act").

The Order directly contravenes the Act. It is also a complete and unlawful reversal, without notice and comment and without a reasoned justification, of: (i) the Commission's steadfast adherence to Congress's command that the Act's cost-based pricing requirements be promptly and fully implemented in order to promote the swift introduction of

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[2/] See 47 C.F.R. §§ 1.4(b)(2) and 1.103.

competition in local telecommunications markets, and (ii) the Commission's longstanding refusal to make universal service reform a prerequisite for implementation of the Act's unambiguous requirements, including deaveraging. MCI WorldCom has petitioned the United States Court of Appeals for the District of Columbia Circuit for review. See MCI WorldCom, Inc. v. Federal Communications Commission, No. 99-1182 (D.C. Cir. filed May 17, 1999).[3/] AT&T has moved to intervene in that appeal.

STATEMENT OF THE CASE

Since the passage of the 1996 Act, the Commission has consistently pursued the timely implementation of the Act's provisions and urged state utility commissions to adopt geographically deaveraged rates for network elements to comply with the cost-based pricing requirement of § 252 of the Act. Now, in the aftermath of the Supreme Court's pro-competitive decision in AT&T Corp. v. Iowa Utilities Board, 119 S. Ct. 721 (1999), however, the Commission has suddenly reversed the course it advocated over the past two and one-half years and has suspended the Rule 507(f) deaveraging requirement. In so doing, the Commission is unlawfully delaying implementation of the very cost-based rate structure that it has so fervently pursued to date. Section 252 of the 1996 Act provides that the rates at which incumbent LECs ("ILECs") sell or lease a network element to competing LECs ("CLECs") must be "based on the cost" of providing the network element. 47 U.S.C. § 252(d)(1). Congress sought to establish competitive local telephone markets "as quickly as possible," H.R. Rep. No. 104-204, at 89 (1995) ("H.R. Rep."), and, quite rationally, provided for the implementation of the Act's local competition provisions prior to completion of universal service reform. Compare 47 U.S.C. § 251(d)(1) with 47 U.S.C. § 254(a); Southwestern Bell Tel. Co. v. FCC, 153 F.3d 523, 536-37 (8th Cir. 1998). All

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[3/] Should the Commission fail to resolve this motion within ten days of its filing, movants will consider that inaction to constitute a denial and, therefore, will seek appropriate relief in the Court of Appeals.

agree that loop costs vary dramatically in different geographic regions of a state depending on population density. The Commission therefore determined in 1996 that a state-wide average rate cannot represent the "cost" of providing unbundled network elements, First Report and Order, In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15499, ¶ 764 (1996) ("Local Competition Order"), and issued Rule 507(f).

Thereafter, the Commission rejected the incumbent LECs' request to stay the Local Competition Order, including the deaveraging rule, finding that "a stay of our rules would subvert Congress' plan to have such rules in place during arbitration proceedings." Order, In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 11754, ¶ 19 (1996) ("Local Competition Stay Denial Order"). Since then, the Commission repeatedly and properly has maintained the position in litigation nationwide that the Act's insistence on cost-based pricing requires deaveraged network element rates. See infra note 7. Until this Order, moreover, the Commission had consistently interpreted the Act to require deaveraging without waiting for completion of universal service reform.[4/]

On direct review of the Local Competition Order, the United States Court of Appeals for the Eighth Circuit vacated the Commission's pricing regulations, including Rule 507(f), on the ground that the Commission lacked jurisdiction to issue them. Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999). The Supreme Court subsequently reversed the Eighth Circuit's jurisdictional determination, thereby reinstating the pricing rules.

[4/] See Report and Order, In re Federal-State Joint Board on Universal Service, 12 F.C.C.R. 8776, ¶ 14 (1997) ("Universal Service Order"); Order, In re Access Charge Reform, CC Docket No. 96-262, FCC 97-216, ¶¶ 17-20 (rel. June 18, 1997) ("Access Charge Stay Denial Order"); Southwestern Bell Tel. Co. v. FCC, 153 F.3d at 536-37.

AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 729-33 (1999). In light of the Supreme Court's decision, at least two federal district courts recently have ruled that a state commission's failure to deaverage network element rates in § 252 arbitration proceedings is contrary to the Commission's binding regulations. See U S West Communications, Inc. v. Thoms, No. 4-97-CV-70082, slip op. at 4-5 (S.D. Iowa Apr. 19, 1999); MCI Telecommunications Corp. v. U S West Communications Corp., No. 97-CV-919, slip op. at 10-12 (D. Minn. Mar. 30, 1999). Those courts have remanded interconnection agreements to the state commissions with instructions to apply Rule 507(f).

Nonetheless, on May 7, 1999, without providing notice or an opportunity to comment, the Commission abruptly changed course and issued the Order, which suspends Rule 507(f) until six months after the issuance of a high-cost order for non-rural LECs in the Commission's universal service docket. See Order ¶¶ 1, 3. The Commission did not question its prior determination that the Act's cost-based pricing standard requires deaveraging. Rather, it reaffirmed that determination by stating that state commissions must comply with Rule 507(f) after its temporary suspension expires. Id. ¶ 4. Yet, the Commission failed to give any reasoned explanation for abandoning its long-standing refusal to precondition the effectiveness of its deaveraging rule on universal service reform. Commissioner Ness highlighted the Commission's abandonment of its earlier position, noting that the Commission had improperly "chang[ed] course without seeking comment from the public." Order, Concurring Statement of Commissioner Ness, at 1, 2.

MCI WorldCom has filed a Petition for Review of the Order in the United States Court of Appeals for the District of Columbia Circuit. MCI WorldCom, Inc. v. Federal

Communications Commission, No. 99-1182 (D.C. Cir. filed May 17, 1999). Pending judicial review, the Order should be stayed.

ARGUMENT

A stay should be granted where 1) the movant is likely to prevail on the merits; 2) the movant will likely suffer irreparable harm absent a stay; 3) others will not be harmed if a stay is issued; and 4) the public interest will not be harmed. See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 842-43 (D.C. Cir. 1977). Relief should be granted if a movant demonstrates "either a high likelihood of success and some injury, or vice versa." Population Inst. v. McPherson, 797 F.2d 1062, 1078 (D.C. Cir. 1986). The criteria for a stay are easily satisfied here.[5/]

I. Movants Are Likely To Prevail On The Merits.

Movants will prevail on the merits of their claims that the Order is (a) contrary to law, (b) procedurally infirm, and (c) arbitrary and capricious. See 5 U.S.C. § 706(2)(A). We discuss these dispositive legal claims seriatim.

A. The Commission Lacks Statutory Authority To Suspend Its Deaveraging Regulation.

The Commission's Order is "not in accordance with law," 5 U.S.C. § 706(2)(A), because it violates several provisions of the 1996 Act, and likely will be vacated by the Court of Appeals. Specifically, the text, structure, and purposes of the Act confirm that the Commission presently lacks statutory authority to suspend or forbear from enforcing the Act's unbundling requirements, including the requirement that rates be based on cost.

[5/] Likelihood of success on the merits and irreparable harm must be examined together, because a very strong showing on one of these prongs lowers the hurdle for the other. See Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 19 (1st Cir. 1996). The greater the likelihood of success on the merits, the less that is required in the way of irreparable harm, EEOC v. Astra USA, Inc., 94 F.3d 738, 743 (1st Cir. 1996), so that irreparable harm is analyzed on a "sliding scale," Gately v. Massachusetts, 2 F.3d 1221, 1232 (1st Cir. 1993), and vice versa.

The Commission does not dispute that § 252(d)(1)'s cost-based requirement mandates the deaveraging of network element rates. See 47 U.S.C. § 252(d)(1). In most States, the cost of providing the local loop will vary dramatically in different regions of the state. In the State of Washington, for example, the cost of providing local loops in rural areas of the state can be as much as eight times the cost of providing the same loops in urban areas.[6/] One averaged rate simply cannot reflect the varying cost of providing the same element in different geographic regions of a state.

The Commission adopted Rule 507(f) because "deaveraged rates more closely reflect the actual costs of providing interconnection and unbundled elements," as required by the Act. Local Competition Order ¶ 764. In litigation throughout the country, the Commission has consistently reaffirmed that, under the Act, "rates generally must reflect the differences in costs . . . in different geographic areas," and that statewide average rates "necessarily do not reflect the cost of providing unbundled network elements. . . ."[7/] Indeed, the instant Order presupposes this requirement of the Act by providing that Rule 507(f)'s deaveraging requirements shall automatically become effective six months after the

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[6/] See Brief of MCImetro Access Transmission Servs., MCImetro Access Transmission Servs. v. GTE Northwest, Inc., No. 98-35806, at 28 (9th Cir. filed Dec. 12, 1998) (citing Attachment 2 to Direct Testimony of I. Curtis Jernigan, at R.E. 18); see also Lichtenberg Decl. ¶ 6 (attached hereto as Exhibit 1) (in Illinois, unbundled loop prices for the least dense of three zones are 4.4 times the prices for the most dense zone).

[7/] Memorandum of the Commission as Amicus Curiae, MCI Telecommunications Corp. v. U S West Communications, Inc., No. 97-1576 at 13-16 (D. Or. filed Oct. 9, 1998) (emphasis added); see also, e.g., Brief of the Commission as Amicus Curiae, U S West Communications, Inc. v. Garvey, No. 97-CV-913, at 33-35 (D. Minn. filed Aug. 31, 1998) (and related cases) (same); Memorandum of the Commission as Amicus Curiae, BellSouth Telecommunications, Inc. v. Tennessee Regulatory Auth., No. 3-97-0523, at 18-20 (M.D. Tenn. filed Apr. 24, 1998) (and consolidated cases) (same); Memorandum of the Commission as Amicus Curiae, U S West Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc., No. C97-1320R, at 15-17 (W.D. Wash. filed Apr. 16, 1998) (and consolidated cases) (same).

Commission's high-cost order in the universal service docket. Order ¶ 3.[8] Notwithstanding the Commission's own continuing (and correct) view that the requirement of cost-based rates compels deaveraging, the Commission decided to suspend enforcement of the deaveraging requirement. Even if the Order's stated rationales for this action were reasonable (which they are not, see infra Part I.C), the Commission's own policy concerns can never justify violation of a statute enacted by Congress. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984); Natural Resources Defense Council, Inc. v. Reilly, 976 F.2d 36, 40-41 (D.C. Cir. 1992) (vacating agency's decision to suspend regulation for policy reasons where suspension was not authorized by statute).

Congress clearly intended that the Act's cost-based rate requirement be enforced immediately. As the Commission itself correctly emphasized before the Eighth Circuit, the Act "contemplates sequential implementation of (first) the market opening provisions of the 1996 Act that create competition and (then) the provision calling for a new explicit and sustainable universal service mechanism." Brief for Federal Communications Commission, Southwestern Bell Tel. Co. v. FCC, No. 97-2618 (8th Cir. filed Dec. 16, 1997); see also Southwestern Bell Tel. Co., 153 F.3d at 536 (adopting position advocated by Commission).[9] This "sequential implementation" was intended to ensure that the Commission's regulations would be firmly in place in time to guide the state commissions in conducting their market-opening arbitrations pursuant to § 252 of the Act. See 47 U.S.C.

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[8] The stated purpose of the Order is to "afford the states an opportunity to bring their rules into compliance with [Rule 507(f)]." Id. ¶ 4 (emphasis added).

[9] See also Access Charge Stay Denial Order ¶ 19 (Commission has "complied with the staggered statutory rulemaking timetable for implementing access to unbundled network elements under Sections 251 and 252").

§ 251(d)(1) (requiring Commission to establish regulations implementing § 251 by August 8, 1996).

Accordingly, the Commission has consistently sought to ensure that its rules remain in place while § 252 proceedings are pending.[10/] Moreover, Congress intended that the introduction of competition in local telephone markets would not only precede universal service reform, but would affirmatively precipitate it.[11/] By refusing to enforce its deaveraging regulations until after universal service reform is implemented, the Commission guarantees that its deaveraging rules are not in place to guide state commissions in still-ongoing arbitration proceedings, and it negates cost-based rates as a force to bring about the prompt reform of implicit universal service subsidies. The Commission's belated decision to link the unbundling requirements with universal service reform by suspending the deaveraging rule is thus foreclosed by the plain terms of the Act.

Indeed, § 10 of the Act explicitly prohibits the Commission from suspending enforcement of § 251(d)(1)'s cost-based rate requirements until those and other requirements are fully implemented by the ILECs. See 47 U.S.C. §160 (sharply limiting the Commission's power to "forbear from applying . . . any provision of this chapter"). Congress expressly provided that "the Commission may not forbear from applying the requirements of section 251(c)," which sets forth the incumbent's duty to provide

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[10/] See Local Competition Stay Denial Order ¶ 19 ("a stay of our rules would subvert Congress' plan to have such rules in place during arbitration proceedings"); id. ¶ 30 ("it is important that the regulations established in the [Local Competition Order] not be stayed while negotiations and arbitration proceedings are taking place"); id. ¶ 31 ("a stay of our rules would frustrate implementation of the procedure established by Congress").

[11/] See Universal Service Order ¶ 14 ("We further believe that, as competition develops, the marketplace itself will identify intrastate implicit universal service support, and that states will be compelled by those marketplace forces to move that support to explicit, sustainable mechanisms consistent with section 254(f)"); Access Charge Stay Denial Order ¶ 17.

unbundled elements at just and reasonable rates and incorporates by reference the cost-based standard of § 252(d)(1), until "those requirements have been fully implemented." 47 U.S.C. § 160(d) (emphasis added).

Because it is undisputed that the Act's unbundling requirements have not "been fully implemented," § 10 expressly forbids the Commission from "forbear[ing] from applying" those requirements -- including the requirement that unbundled elements be cost-based and, therefore, be deaveraged. Yet that is precisely what the Order does. As such, it is manifestly contrary to law. See Natural Resources Defense Council, Inc., 976 F.2d at 40-41 (agency lacked authority to stay promulgated regulations where stay violated implementation timetable dictated by Congress).

B. The Order Is Unlawful For The Additional Reason That The Commission Failed To Conduct The Requisite Notice And Comment Rulemaking.

Even if the Act itself did not clearly prohibit the Commission from suspending its lawful and duly promulgated deaveraging regulation, the Commission's decision to suspend Rule 507(f) without complying with the notice and comment procedures of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, was patently unlawful.[12/] Under the APA, an agency's properly promulgated rules and regulations, such as Rule 507(f), are binding law "until such time as [the agency] alter[s] them through another rulemaking." Southwestern Bell Tel. Co. v. FCC, 28 F.3d 165, 169 (D.C. Cir. 1994) (emphasis added). Courts have uniformly held that where, as here, a federal agency has sought to suspend a legislative rule after it has been duly adopted and promulgated, the suspension order itself is

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[12/] The only authority relied on by the Commission in support of its suspension is 47 C.F.R. § 1.3, see Order ¶ 4 n.9, which provides that "[t]he provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act. . . ." 47 C.F.R. § 1.3 (emphasis added). The APA, in turn, subjects all agency rulemaking to the APA's notice and comment requirements. 5 U.S.C. § 553(b).

a rulemaking subject to the APA's notice and comment procedures. See, e.g., Environmental Defense Fund, Inc. v. Gorsuch, 713 F.2d 802, 815 (D.C. Cir. 1983). For example, in Council of the Southern Mountains, Inc. v. Donovan, 653 F.2d 573 (D.C. Cir. 1981), the Mine Safety and Health Administration issued an order without notice and comment extending a regulation's previously established two-year phase-in period. The Court of Appeals concluded that the agency's six-month deferral of the rule's implementation date had "palpable effects upon the regulated industry and the public in general," and thus was a substantive rule requiring notice and comment. Id. at 580 & n.28 (internal quotation marks and citation omitted).[13/] Here, the Commission's Order suspending Rule 507(f) alters the substantive rights and obligations of regulated entities and affects the general public, and therefore constitutes a rulemaking subject to the APA's notice and comment requirements. See id.; Order, Concurring Statement of Commissioner Ness at 1.

The Order is not subject to the "good cause" exception to the APA's notice and comment procedures. Section 553 exempts an agency rulemaking from the APA's procedural requirements, "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B). "[T]he good cause exception [to § 553] is to be narrowly construed and only reluctantly countenanced. It is not an escape clause that may be arbitrarily utilized at the agency's whim." Tennessee Gas Pipeline Co. v. FERC, 969 F.2d 1141, 1144 (D.C.

[13/] See also Kennecott Utah Copper Corp. v. United States Dep't of the Interior, 88 F.3d 1191, 1207 (D.C. Cir. 1996) (recognizing that suspensions typically are subject to the APA's procedural requirements because of "the immediate substantive impact of the agency's postponement decision on the parties' legal obligations under duly promulgated regulations"); Environmental Defense Fund, Inc. v. EPA, 716 F.2d 915, 920 (D.C. Cir. 1983) ("The suspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under APA § 553").

Cir. 1992) (internal quotation marks and citation omitted). This exception is reserved for "emergency situations." Action on Smoking & Health v. Civil Aeronautics Bd., 713 F.2d 795, 800 (D.C. Cir. 1983); Donovan, 653 F.2d at 581 (safety regulation had "life-saving importance"). And the temporary or interim nature of an agency's action is insufficient to excuse an agency from abiding by the notice and comment requirements. Tennessee Gas Pipeline Co., 969 F.2d at 1145. In any event, the Commission did not and cannot now invoke this exception as a post hoc justification for having ignored the dictates of the APA. 5 U.S.C. § 553(b)(3)(B) (agency must incorporate in its order its "finding and a brief statement of reasons" for its reliance on this exception).

C. The Suspension Order Is An Unexplained Reversal Of Course That Fails The Test Of Reasoned Decisionmaking.

Perhaps because the Commission failed to solicit public comments before acting, the Order unlawfully fails to provide a reasoned explanation for the Commission's 180-degree reversal of several long-standing policies. "[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored . . . ." Bush-Quayle '92 Primary Comm., Inc. v. Federal Election Committee, 104 F.3d 448, 453 (D.C. Cir. 1997) (emphasis added) (internal quotation marks and citations omitted).[14/]

First, the Commission has steadfastly maintained that state commissions must promptly adopt deaveraged network element rates and that the Commission's rule requiring deaveraged rates must remain in effect while § 252 proceedings are pending. See supra pp. 7-8. As the Commission has correctly observed, "a stay of our rules would subvert Congress' plan to have such rules in place during arbitration proceedings." Local

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[14/] See also Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983); Southwestern Bell Tel. Co. v. FCC, 28 F.3d 165, 169 n.2 (D.C. Cir. 1994) (FCC must explain a deviation from even a policy statement).

Competition Stay Denial Order ¶ 19; see also id. ¶¶ 30-31. The Commission has also repeatedly observed that its § 251 rules "help the states, the DOJ, and the FCC carry out their responsibilities under section 271, and assist BOCs in determining what steps must be taken to meet the requirements of section 271(c)(2)(B), the competitive checklist." Local Competition Order ¶ 57; Local Competition Stay Denial Order ¶ 19. But with no explanation as to why regulators and the industry no longer need to abide by the Act or why national regulations are no longer necessary, the Commission has now taken the very action that it previously -- and correctly -- found "would subvert Congress' plan."

The glaring absence of explanation for this about-face makes the Order arbitrary and capricious, regardless of whether a rational explanation could be given. And one could not. The experience of the past two and one-half years has borne out the Commission's original determination on this point. State commissions arbitrated interconnection agreements during the vacatur of the Commission's pricing rules, and therefore they were required to make independent determinations as to the Act's pricing requirements. State commissions and parties alike expended tremendous resources addressing questions under the Act that the Commission's rules would have answered directly. Now state commissions are once again without definitive pricing rules. There was no possible basis for the Commission to abandon, without explanation, its prior determination that "it is important that the regulations established in the [Local Competition Order] not be stayed while negotiations and arbitration proceedings are taking place." Local Competition Stay Denial Order ¶ 30.

Second, in a similarly unexplained reversal, the Order explicitly conditions the implementation of deaveraged rates on the completion of universal service reform. See Order ¶ 6. The Order fails even to acknowledge the Commission's heretofore firmly entrenched policy, mandated by the Act itself, to implement and enforce the Act's local competition provisions before universal service reform. See supra Part I.A; Order,

Concurring Statement of Commissioner Ness, at 2. The Commission merely notes that its action will give the Commission and state regulators additional time to implement the Act's deaveraging requirement. That statement, however, does not in any way explain why now, more than three years after the adoption of the Act, such additional delay is necessary or lawful.

Third, the Order also asserts that in the context of current universal service mechanisms, deaveraged rates "might create arbitrage opportunities or distort entry incentives for new competitors." Order ¶ 6. Both the Commission and the courts have repeatedly rejected this argument as groundless.[15/] The Order fails to acknowledge the Commission's prior rejection of the ILECs' arbitrage argument or explain why the Commission has suddenly invoked it to delay cost-based pricing until after universal service reform. The Commission's unexplained about-face is arbitrary and capricious and likely will be set aside on appeal.

Fourth, the Order directly undermines the Commission's claimed purpose of "ameliorat[ing] disruption" in the implementation of deaveraged rates. See Order ¶ 4. The actual effect will be just the opposite. Rule 507(f) was originally stayed and vacated by the Eighth Circuit but was reinstated by the Supreme Court on January 25, 1999. The Rule has been in effect, therefore, for nearly four months. Now it is once again being set aside, only to take effect again at some indeterminate time in the future. For now, therefore, the Order

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[15/] See Access Charge Stay Denial Order ¶ 20 ("the availability of UNEs at [cost-based] rates that exclude subsidies [i]s unlikely to have a dramatic short-term impact on the ability of price cap LECs to fulfill their universal service obligations"); Southwestern Bell Tel. Co., 153 F.3d at 541 ("given the relatively insignificant headway UNE purchasers have made in the telecommunications market, universal service will not be threatened"); AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. at 737 (rejecting the notion that the remote possibility of "arbitrage" should forestall implementation of the Act's pro-competitive requirements and stating that "§ 254 requires that universal-service subsidies be phased out, so whatever possibility of arbitrage remains will be only temporary").

re-establishes the regime of a single national telecommunications policy administered by fifty independent state agencies—a regime dismissed by the Supreme Court as "surpassing strange." AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. at 730 n.6. The Order thus prolongs the uncertainty surrounding the Act's implementation and will significantly disrupt § 252 proceedings across the country.

To this point, CLECs have been relegated to a circuitous and arduous path in their quest for interconnection agreements, in part because of the uncertain status of the Commission's pricing rules. For example, in an arbitration between MCI WorldCom and US West conducted while the Commission's pricing rules were stayed and then vacated by the Eighth Circuit, the Iowa Utilities Board ("IUB") refused to order deaveraged network element rates. The district court initially declined to set aside that decision because the Supreme Court had not yet reinstated the Commission's pricing rules. See U S West Communications, Inc. v. Thoms, No. 4-97-CV-70082, slip op. at 71-74 (S.D. Iowa Jan. 25, 1999). The same day, however, the Supreme Court reinstated the pricing rules. Consequently, the district court properly reconsidered its prior decision and, based on the reinstatement of Rule 507(f), correctly ordered the IUB to deaverage rates. See U S West Communications, Inc. v. Thoms, No. 4-97-CV-70082, slip op. at 4-5 (S.D. Iowa Apr. 19, 1999). Finally, three years after its request for negotiation of an interconnection agreement with U S West, MCI WorldCom has an enforceable order in Iowa by which it may obtain cost-based rates for network elements. But the Commission's Order introduces another bend in the path because the IUB may now delay action on setting deaveraged rates.[16/]

[16/] The Order may introduce a similar disruption into the Commission's review of BOC applications pursuant to § 271 of the Act for entry into long distance markets. The Order provides no assurance to movants that the Commission will treat applications filed during the suspension of Rule 507(f) the same as it treats those filed when that rule becomes effective again. See infra pp. 19-20.

In other States, where no binding judicial order governs as to deaveraging, commissions conducting § 252 rate-setting proceedings while the Order is in effect may decline to deaverage rates. Tremendous confusion may ensue upon expiration of the Order when CLECs seek application of Rule 507(f). For example, after the Supreme Court reinstated the Commission's pricing rules, some courts have mistakenly held that interconnection agreements that were arbitrated during the Eighth Circuit's vacatur need not comply with the reinstated rules, thereby permitting ongoing and prospective violations of the Commission's binding rules, and thus of federal law. See U S West Communications, Inc. v. Jennings, No. CV 97-26, slip op. at 3 (D. Ariz. May 5, 1999); MCI Telecommunications Corp. v. GTE Northwest, Inc., No. 97-1687-JE, ____ F. Supp. 2d ____, 1999 WL 151039, at *12-*13 (D. Or. Mar. 17, 1999).[17/] Given that the Order only creates new uncertainty, this ill-tailored method of "ameliorat[ing] disruption" is arbitrary and capricious.

II. Movants Will Suffer Irreparable Harm Absent A Stay.

The equities here also decidedly favor entry of a stay. Delaying implementation of the Act's requirement that network element prices be deaveraged irreparably harms movants and others. The absence of cost-based rates and the uncertainty as to when such rates will be available will delay AT&T and MCI WorldCom from entering many local markets. Such harm cannot be undone by a subsequent court decision setting aside the Commission's unlawful Order.

In the wake of the Order, MCI WorldCom, AT&T, and other CLECs are no longer able to rely on the imminent advent of cost-based rates. For example, neither the Iowa

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[17/] But see U S West Communications, Inc. v. Thoms, No. 4-97-CV-70082, slip op. at 4-5 (S.D. Iowa Apr. 19, 1999); MCI Telecommunications Corp. v. US West Communications, Inc., No. 97-CV-919, slip op. at 10-12 (D. Minn. Mar. 30, 1999).

commission nor the Iowa district court would interpret the Act to require deaveraged rates in the absence of Rule 507(f). See supra p. 14. Now that the Commission has suspended Rule 507(f), the future of deaveraging in Iowa is uncertain. The same is true elsewhere. See MCI Telecommunications Corp. v. U S West Communications, Inc., No. 97-CV-919, slip op. at 10-12 (D. Minn. Mar. 30, 1999) (ordering deaveraged rates based on Rule 507(f)). Indeed, the Order ensures regulatory instability by creating an ever-fluid regulatory environment in which the rules governing deaveraging will change every few months. Supra Part I.C. For that reason the Order only fosters confusion about how district courts should review state commission decisions made during this stay period. Id. This resulting uncertainty, which serves no valid purpose whatsoever, plainly undermines the ability of parties such as AT&T and MCI WorldCom to create and implement rational business plans necessary for providing local service and thereby prevents the speedy development of competitive markets desired by Congress. See Lichtenberg Decl. ¶ 9 (attached hereto as Exhibit 1); Order, Concurring Statement of Commissioner Ness, at 1.

An economic prerequisite for competitive entry using network elements is that the cost of providing service -- primarily the cost of the network elements -- not exceed the revenue that can be obtained from selling that service. Lichtenberg Decl. ¶ 5. In denser urban zones, state-wide averaging necessarily raises the cost of network element prices far above where they should be with three-zone deaveraging. Id. ¶¶ 5-7. Indeed, the Commission itself has determined that state-wide averaging results in urban network element prices above the cost-based level required by the Act. Local Competition Order ¶ 764. By setting prices at an unlawfully high level, statewide average rates are very likely to make competitive entry in many markets economically infeasible. Lichtenberg Decl. ¶¶ 5-7.

The effects of MCI WorldCom's and AT&T's inability to rely on deaveraged rates is illustrated by MCI WorldCom's efforts to enter residential markets for local service. The only practical way to enter many residential markets in the first instance is by leasing the incumbent LEC's network elements. Id. ¶¶ 2-4. But excessive network element prices create an absolute barrier to residential market entry. Id. ¶ 5. Without even the possibility of entry into the residential market, movants cannot justify the huge expenditures needed to solve the other problems standing in the way of competitive entry. Id. ¶ 8. Movants can begin working to overcome these other barriers only after realistic network element prices have been set, so that the launch date of any residential market offering is anywhere from 12 to 18 months from the date reasonable prices are set.[18/] Id. Hence, the Commission's decision to delay cutting urban network element rates to the level required by the Act will have an effect on movants' competitive position for years to come. Id. ¶¶ 8-9.

The resulting harm to movants' business is plainly irreparable. No form of injunctive relief ordered after the fact could place MCI WorldCom and AT&T in the market positions they would have been in had the Order not unlawfully prevented them from entering local markets. This egg cannot be unscrambled. Nor could damages provide adequate relief. There is no readily apparent cause of action that might provide movants with a damages remedy under these circumstances. See Iowa Utils. Bd. v. FCC, 109 F.3d 418, 426 (8th Cir. 1996) (finding irreparable harm from economic loss in these circumstances because carriers "would not be able to bring a lawsuit to recover their undue economic losses if the FCC's rules are eventually overturned"). Where damages cannot be

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[18/] This lag time between the setting of lawful, cost-based prices and any possible residential market entry by competing carriers confirms that even if prices were set at lawful levels today, significant market entry could not occur until well after states have an opportunity to complete universal service reform. The Commission's oft-repeated finding that competition cannot erode universal service subsidies before states can complete universal service reform is certainly correct.

recovered, economic harm is irreparable. Brenntag Int'l Chems., Inc. v. Bank of India, No. 98-7992, __ F.3d __, 1999 WL 242261, at *4 (2d Cir. Apr. 26, 1999).

Even if movants did have a cause of action for damages, damages could not repair the harm to movants' businesses from being excluded from local markets, because the resulting lost profits would be incalculable.[19/] This is especially true because movants' entry into the residential market for basic local service is the precondition for AT&T and MCI WorldCom to sell advanced or vertical services and features, to collect interstate access charges, to offer "one-stop shopping" packages combining local and long-distance services, and to reduce their costs in offering long-distance service arising from the above-cost access charges collected by other local carriers. Lichtenberg Decl. ¶¶ 10-11. Where lost sales of one product will have a domino effect on sales of other products, damages are inherently difficult to calculate, rendering the loss irreparable.[20/] In sum, the Order's delay in opening residential markets will cause movants irreparable harm.

III. A Stay Of The Order Would Serve The Public Interest And Would Harm No Other Party.

The remaining equities also strongly favor entry of a stay. First, a stay of the Order would plainly serve the public interest. The purpose of the Act is to introduce competition into local phone markets "as quickly as possible." H.R. Rep. at 89. But the Order delays

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[19/] In general, difficulties in proving the amount of lost profits "make it chancy to rely on a damage award to provide full compensation," thereby justifying a finding of irreparable harm. General Leaseways, Inc. v. National Truck Leasing Ass'n, 744 F.2d 588, 591 (7th Cir. 1984); accord O'Donnell Constr. Co v. District of Columbia, 963 F.2d 420, 428 (D.C. Cir. 1992) ("The difficulty of such an inherently speculative showing [of lost profits resulting from exclusion from bidding on contracts] weigh heavily in favor of granting the [preliminary] injunction"). This is especially true where novel services or markets are involved, because there is no historical record on which to base an estimate of damages in such cases. See Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 552 (4th Cir. 1994).

[20/] Tom Doherty Assocs. v. Saban Entertainment, Inc., 60 F.3d 27, 38 (2d Cir. 1995); Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 19-20 (1st Cir. 1996).

the development of competition, and thereby harms the public's paramount interest as determined by Congress. Moreover, Congress spelled out the parameters of how competition is to be achieved: it mandated that network element prices be cost-based; told the Commission to proceed with local competition reform as the highest priority, which could not be subordinated to universal service timetables; and forbade the Commission from forbearing from enforcing the local competition requirements of the Act. The Order subverts all these congressional determinations of what is in the public interest. Supra Part I.A.

Staying the Order will have absolutely no negative impact on the public interest. The only colorable harm that could conceivably be claimed to arise from a stay would be that deaveraging rates might erode implicit subsidies for universal service. There is no factual merit to that claim. Supra Parts I.A, I.C. In addition, by forbidding the Commission from forbearing to enforce the Act's local competition requirements and by ordering the Commission to proceed with local competition reform before universal service reform, Congress expressly rejected the notion that local competition could be delayed to protect implicit subsidies. Thus, even if factually supported, the goal of protecting implicit subsidies from competition is not a permissible one.

Finally, by staying cost-based rates at this time, the Commission undermines the process for considering BOC applications to compete in in-region interLATA markets pursuant to § 271 of the Act. The Order gave no indication of how the Commission would assess such an application while Rule 507(f) is stayed. Were the Commission to grant an application in the absence of cost-based rates, it would be prematurely permitting the BOC to compete in long distance markets in violation of § 271(c)(2)(B)(ii) and in contravention of Congress's overarching goal of providing competitive service for consumers in both local and long distance markets.

No party's lawful interests would be harmed by entering a stay.

CONCLUSION

For all these reasons, the Order should be stayed pending judicial review.

Respectfully submitted,

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